In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1673

FREEMAN W. SAILOR, PETITIONER

v.

UNITED STATES OF AMERICA

LOUIS R. KLOTTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The court of appeals affirmed the judgment of the district court without opinion (Pet. App. 29). The opinions and orders of the district court (Supp. R. 5, 16)[1] are not officially reported.

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[1] "Supp. R." references are to the supplemental appendix in the court of appeals.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 1972 (Pet. App. 29). The petition for a writ of certiorari was filed on June 23, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the courts below correctly held that the assessments of wagering excise and occupational taxes made against petitioners pursuant to Sections 4401 and 4411 of the Internal Revenue Code of 1954 were constitutionally permissible.

STATUTES INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

> SEC. 4401. IMPOSITION OF TAX.
>
> (a) *Wagers.*—There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.
>
> * * * * *
>
> (c) *Persons Liable for Tax.*—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. * * *

SEC. 4411. IMPOSITION OF TAX.

There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

STATEMENT

Timely and proper assessments of wagering excise and occupational taxes were made against petitioners. The assessments of the wagering excise taxes covered a period of appoximately one and one-half years for each petitioner and were based on the average gross wagers reported on wagering tax returns (Form 730) filed by petitioners in the prior year (1967). Petitioners each paid the assessed occupational tax and interest and one month's assessed wagering excise tax and interest, and initiated these actions for refund of the amounts so paid. The government counterclaimed for the assessed but unpaid wagering excise taxes and interest. The district court granted the government's motions for judgments on the pleadings and entered judgments for the government. (Supp. R. 2-3, 4-9, 13-14, 16-18.) The court of appeals affirmed (Pet. App. 29).

The decision below, affirming the district court's orders, is correct and is in accord with the decisions of this and other courts. There is no conflict or other reason for further review.

ARGUMENT

1. Petitioners apparently contend (Pet. 17-18) that the wagering excise and occupational taxes were held unconstitutional by this Court in *Marchetti* v. *United States*, 390 U.S. 39; *Grosso* v. *United States*, 390 U.S. 62; and *United States* v. *U.S. Coin & Currency*, 401 U.S. 715. These cases, however, merely held that criminal punishment, or sanctions tantamount to criminal punishment (forfeiture), for noncompliance with the wagering excise and occupational tax provisions contravene the privilege against self-incrimination. In *Grosso* (390 U.S. at 70 fn. 7), the Court carefully pointed out that it was not holding "that a proper claim of privilege extinguishes liability for taxation * * * [but only that it] precludes a criminal conviction." Likewise, in *Marchetti* (390 U.S. at 61) the Court emphasized—

> that we do not hold that these wagering tax provisions are as such constitutionally impermissible; we hold only that those who properly assert the constitutional privilege as to these provisions may not be criminally punished for failure to comply with their requirements.

In *U.S. Coin & Currency* (401 U.S. at 717), *supra*, the Court reaffirmed its position in *Marchetti* and *Grosso* by stating that it "in no way doubted the Government's power to assess and collect taxes on unlawful gambling activities." Here, of course, unlike the situation in the aforementioned cases, the government is seeking neither a criminal conviction nor a forfeiture, but only to assess and collect taxes. All

other courts of appeals which have passed on the question have resolved the issue in the same way as did the court below. *E.g.*, *Hamilton* v. *United States*, 429 F. 2d 427 (C.A. 2), certiorari denied, 401 U.S. 913; *Washington* v. *United States*, 402 F. 2d 3 (C.A. 4), certiorari denied, 402 U.S. 978; *Urban* v. *United States*, 445 F. 2d 641 (C.A. 5), certiorari denied, 404 U.S. 1015; *Cole* v. *Cardoza*, 441 F. 2d 1337 (C.A. 6); *Collins* v. *Daly*, 437 F. 2d 736, 739 (C.A. 7).

2. Petitioners next contend (Pet. 19-21, 25-26) that the government's method of assessing and collecting these taxes violates their Fifth Amendment rights since, it is argued, they can only defend against the assessments by incriminating themselves. But if defense against assessment of these taxes required disclosure of incriminating information, petitioners' remedy would be to move to suppress the incriminating testimony and its fruits in any subsequent criminal prosecution in which its use might be sought. *United States* v. *Blue*, 384 U.S. 251. Since there was no substantial danger to petitioners that they would prejudice themselves by self-incriminating statements in defeating the assessments or maintaining their refund suits, they cannot claim the advantage of the privilege. See *Ullmann* v. *United States*, 350 U.S. 422, 439; *Zicarelli* v. *New Jersey State Commission*, No. 69-4, decided May 22, 1972; *Bowers* v. *United States*, 423 F. 2d 1207 (C.A. 5); *Urban* v. *United States*, *supra*.

The petitioners also argue (Pet. 19, 26) that the assessments violate their constitutional rights since

they are based upon information obtained from wagering excise tax returns filed by them for a prior *pre-Marchetti* year. The government, however, is required to make assessments of the correct tax due, and where a taxpayer refuses (even upon constitutional grounds) to furnish the information on which such assessments are based, the taxing authorities, relying on their own knowledge or on such information as can be otherwise obtained, are permitted to prepare returns on which the assessments can be predicated. See Section 6020(b) of the Internal Revenue Code of 1954. In this instance, the district director used information obtained from returns filed by the taxpayers for prior periods. The evidentiary use of pre-*Marchetti* returns has been upheld by this Court in *Mackey* v. *United States*, 401 U.S. 667. And in *United States* v. *Knox*, 396 U.S. 77, 80 fn. 3, this Court stated that the requirement that wagering tax returns be filed had not been held unconstitutional in *Marchetti*.

3. Petitioners finally assert (Pet. 22-24) that the district court erred in dismissing their refund suits on the government's motion for judgment on the pleadings. The sole ground for recovery set forth by petitioners in their claims for refund and in their complaints was the constitutionality of the wagering occupational and excise taxes. As pointed out above, this Court in *Grosso* and *Marchetti* specifically stated that these taxes are not constitutionally impermissible. Thus, since petitioners have failed to set forth even an arguable legal basis on which they could

prevail, the district court properly granted the government's motions for judgment on the pleadings.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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